

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1313

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-1313, 77-1317, 77-1344, 77-1347,
77-1350, 77-1355, 77-1367, 78-1033, 78-1082,
78-1083, 78-1084, 78-1085, and 78-1090

UNITED STATES OF AMERICA

Appellee

VS.

ANTHONDY D. VOLPE, MICHAEL T. O'BRIEN,
LAWRENCE DI BENEDETTO, JOHN T. DELLA
FERRA, CHARLES BOORNAZIAN, EUGENE POULIN,
WILLIAM JACOMINI, RICHARD BOVINO, ROBERT
E. MORRIS, FRANK CECCHINI, GEORGE
SPEZIALE AND JOHN LEPITO

Appellants

B
P/S

UNITED STATES OF AMERICA

Appellee

VS.

ANTHONY D. VOLPE AND DENNIS BYRNE

Appellant

UNITED STATES OF AMERICA

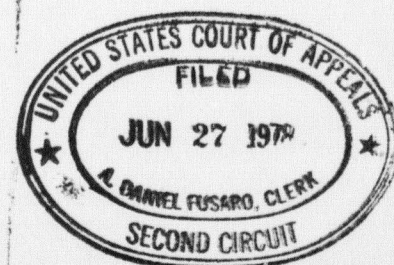
Appellee

VS.

ANNE STEFANO

Appellant

*Petition for Rehearing
with a suggestion for
Rehearing En Banc*



On Appeal From The United States District
Court For The District of Connecticut

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

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VS.

ANNE STEFANOU

Appellant

PETITION

The Appellants herein petition for a rehearing of their consolidated appeals and alternatively suggest rehearing en banc on the ground that the panel overlooked or misapprehended several important and recurring issues in the administration of criminal justice, that is:

(I) that compliance with Section 2518 (1)(E) of Title 18, U.S.C., is a "stringent pre-condition" to the issuance of an interception order;

(II) that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 neither authorizes or contemplates a joint application for the simultaneous interception of both wire and oral communications;

(III) that Sections 2510(11) and 2518(10)(a) conferred upon these appellants an automatic statutory standing to challenge the interceptions since the several surreptitious entries permitted unlawful interceptions, were not sufficiently authorized on the face of the interception authorization, and were not made in conformity with the Court's express order of authorization or approval;

(IV) that the prior rule set down in a decision of a panel of this Court in United States v. Scafidi, has been enlarged by the summary decision in the instant appeal to permit surreptitious entries to install oral and wire interception devices into premises other than "target premises" which other premises are not mentioned or referred to in any way in the Government's Application, or the Court's Order and Authorization;

(V) that the rule of this Circuit, as stated in United States v. Scafidi, permitting surreptitious entries to install oral and wire interception devices without specific authorization by Court order, is an incorrect application of Title III and the Fourth Amendment.

The panel rendered its decision in a one-paragraph memorandum decision on the day after oral argument was heard. All the aforesaid issues were raised in appellants' lengthy brief and then at oral argument.

(I)

The evidence presented at the hearings on the Appellants' Motion to Suppress was uncontroverted that the three law enforcement officers who helped to draft the affidavit in support of the wiretap and oral communication application of December 16, 1974, and January 16, 1975, including affiant Santacroce, knew at some time prior to December 16, 1975, that appellant Michael T. O'Brien and the same premises in question here, 103 New Britain Avenue, had been the subject of an earlier State wiretap order.

Section 2518(1)(E) sets a statutory precondition for obtaining an interception order that requires full disclosure to the judge to whom said application is made of all previous wiretap applications and the action taken thereon. Strict compliance with this procedure is mandated and failure to follow it should have resulted in suppression. United States v. Giordano, 416 U.S. 505, 527 (1974); United States v. Chavez, 416 U.S. 562, 580 (1974); United States v. Bernstein, 509 F.2d 996 (4 Cir. 1975); United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974).

The District Court in ruling on this issue in its memorandum on the Motion to Suppress found this non-disclosure to be unintentional and harmless. This Court erred in affirming this issue in that the mandate of Section 2518(1)(E) is one of a stringent precondition to the issuance of an interception order. Non-compliance with this condition merited suppression.¹

¹This issue is briefed at pp. 14-24 of Appellants' Consolidated Brief on Appeal.

(II)

The instant case presented a novel instance wherein the Government applied simultaneously for authority to "bug" and wiretap the premises at 103 New Britain Avenue. No additional showing of need to utilize a "bug" in addition to the wiretap was made by the Government or required by the Court.

That "bugging" presents a greater intrusion on one's privacy has been clearly recognized. See, Olmstead v. United States, 277 U.S. 438 (1928); Goldman v. United States, 362 U.S. 129 (1942); Silverman v. United States, 365 U.S. 505 (1961); Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41, 64, (1967); 18 U.S.C. Section 2511(1)(a)(b)(1970); S. Rep. 1097, supra, at 91-92, 161; United States v. Scafidi, 564 F.2d 633 (2 Cir. 1977) (Dissent of Judge Smith at 645). Section 2516 clearly provides interception of oral communications as an alternative to that of wire communications. Before the greater invasion of privacy occasioned by a bug is authorized the Government should have had to demonstrate a need for investigative means in addition to that shown for the wiretap. If said procedure had been required in the instant case, the various surreptitious entries to install the bug might not have been necessary as the evidence clearly showed the wiretap could have been connected to apparatus outside 103 New Britain Avenue or the basement of 11 Julius Street.²

²This issue is briefed at pp. 29-32 of Appellants' Consolidated Brief on Appeal.

(III)

As a result of numerous surreptitious entries at 103 New Britain Avenue, 99 New Britain Avenue, and 11 Julius Street, both a wiretap and a "bug" were successfully installed to monitor communications at, to, or from the "target premises" at 103 New Britain Avenue. The various moving papers to obtain the Court's Order and Authorization of December 16, 1974, are devoid of any mention of the other premises known as 99 New Britain Avenue and 11 Julius Street.

The District Court in its ruling on appellants' Motion to Suppress found appellants' lacked standing to challenge these interceptions and adhered to the "possessory or proprietary interest concept" needed to object to the claimed illegal entries. This Court also followed this line of reasoning in United States v. Scafidi, 564 F.2d 633 (2 Cir. 1977), cert. denied sub nom., Vigorito v. United States, Napoli v. United States and DeLuca v. United States, 23 Cr.L. 4057 (May 17, 1978). However, in Scafidi, the Court recognized "it seemed artificial " to say that one whose voice would not have been intercepted but for the entry had no standing to say the entry was improper. United States v. Scafidi, *supra* at 639.

Affirming the District Court's finding here on the issue of standing ignores the effect of Sections 2510(11) and 2518(10)(a) which confer statutory standing on one whose voice was overheard to object to unlawful interceptions, or interceptions not sufficiently authorized on the face of the authorization, or interceptions not in conformity with the Court's express order of authorization or approval. The particular facts of this case concerning numerous

surreptitious entries to premises other than the "target premises" clearly bring the entries and lack of authority therefore, within the three categories set out in 18 U.S.C. Section 2518(10)(a).³

(IV) and (V)

In its earlier ruling in United States v. Scafidi, a panel of this Court ruled that interception devices may be installed in the "particular premises" described without a separate Court order authorizing said entry.⁴ Scafidi clearly recognized the split authority on this point. See United States v. Ford, 533 F.2d 146 (D.C. 1977); United States v. Finazzo, 429 F.Supp. 803 (E.D. Mich. 1977); United States v. Rowland, 448 F. Supp. 22 (N.D. Texas 1978); United States v. Agrusa, 541 F.2d 690 (8 Cir. 1976), cert. denied, 429 U.S. 1045; In Re Application of United States, 563 F.2d 637 (4 Cir. 1977); United States v. Dalia, 426 F. Supp. 682 (D.N.J. 1977); United States v. London, 424 F. Supp. 556 (D.Md. 1976), aff'd on other grounds, 556 F.2d 709 (4 Cir. 1977); McNamara, The Problem of Surreptitious Entry to Effectuate Electronic Eavesdrops: How Do You Proceed After the Court Says "Yes"?, 15 Amer. Crim. L. Rev. 1 (1977).

In his concurring opinion in Scafidi, Judge Gurfein found it implicit that "ordinarily a single entry need be made" into

³This issue is briefed at pp. 58-61 of Appellants' Consolidated Brief on Appeal.

⁴The majority opinion in Scafidi was written by Judge Moore with a concurring opinion by Judge Gurfein. Judge Smith dissented. Both Judge Moore and Judge Gurfein sat on the instant appeal.

the particular premises absent the exigent circumstances of equipment malfunction. United States v. Scafidi, supra at 644. By affirming the District Court's opinion on the Motion to Suppress here this Court has now erroneously enlarged the rule of Scafidi to apply to numerous entries to other premises not mentioned in any of the Government's moving papers or the Court's Order or Authorization.

The December 16, 1974, order in this case failed to authorize surreptitious entries into the other premises (99 New Britain Avenue and 11 Julius Street) or the target premises (103 New Britain). In fact, Judge Clarie was never advised that entries were made into 11 Julius Street and/or 103 New Britain Avenue with the use of keys on December 17, 18 (twice), 19, 20 and 30, 1974, in the late night or early morning hours. The Court was never advised that on January 16th and 29th, 1975, similar entries were made. Nor did the Court know of the ruse used on December 19, 1974, to get into 99 New Britain Avenue. In fact, the Court's misgivings about such proposed conduct was made clear at the In Chambers Hearing of December 19, 1974, and the Court required a report back from the Government on the alternatives to the kind of installation. No report was ever made and the agents continued their undisclosed (to the Court) surreptitious entries. (See Appendix to Appellants' Consolidated Brief, pp. 241-254).

This obvious extension of the rule set out in the majority opinion in Scafidi is erroneous and violates any reasonable interpretation of Title III and the Fourth Amendment.

In view of the split of authority in several Circuits and Districts we urge this Court to reconsider its ruling in Scafidi and to adopt the dissenting opinion of Judge Smith in Scafidi and Judge Lay in Agrusa. Such a reversal is mandated by a consideration of the privacy interests involved, the legislative history of Title III, and the Supreme Court's recognition that exigent circumstances are rarely involved in cases of electronic surveillance.

CONCLUSION

The panel's brief was one-paragraph affirmance, issued the day after oral argument was heard, overlooked or fundamentally misapprehended several issues, that is,

(I) that compliance with Section 2518(1)(E) of Title 18, U.S.C., is a "stringent pre-condition" to the issuance of an interception order;

(II) that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 neither authorizes or contemplates a joint application for the simultaneous interception of both wire and oral communications;

(III) that Sections 2510(11) and 2518(10)(a) conferred upon these appellants an automatic statutory standing to challenge the interceptions since the several surreptitious entries permitted unlawful interceptions, were not sufficiently authorized on the face of the interception authorization, and were not made in conformity with the Court's express order of authorization or approval;

(IV) that the prior rule set down in a decision of a panel of this Court in United States v. Scafidi, has now been enlarged by the summary decision in the instant appeal to permit surreptitious entries to install oral and wire interception devices into premises other than the "target premises"

which other premises are not mentioned or referred to in any way in the Government's Application, or the Court's Order and Authorization;

(V) that the rule of this Circuit, as stated in United States v. Scafidi, permitting surreptitious entries to install oral and wire interception devices without specific authorization by Court order, is an incorrent application of Title III and the Fourth Amendment.

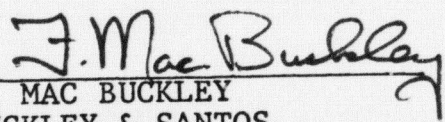
For these reasons, the panel should rehear the case and reverse the Judgment.

Since this case presents questions of exceptional importance decided differently in several Circuits and District Courts, the appellants suggest a rehearing en banc.

RESPECTFULLY SUBMITTED,

Dated: June 25, 1978

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CERTIFICATION

THIS IS TO CERTIFY that two copies of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc have been mailed to Peter R. Casey, III, Special Attorney, U.S. Department of Justice, 450 Main Street, Hartford, Conn. 06103; and further that a copy of said Petition has also been mailed to each of the following counsel of record:

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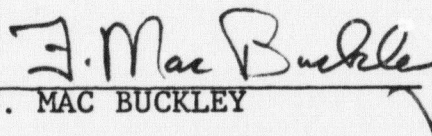
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